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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

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UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
*Petitioners,*
v.
STATE OF SOUTH DAKOTA and CITY OF OACOMA,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## BRIEF OF AMICI CURIAE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, THE MENOMINEE INDIAN TRIBE OF WISCONSIN, THE SEMINOLE TRIBE OF FLORIDA, THE NARRAGANSETT INDIAN TRIBE AND THE ST. REGIS MOHAWK TRIBE IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICI

*Amici* are all federally-recognized Indian tribes organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. All *amici* but the Menominee Tribe of Wisconsin and the St. Regis Mohawk Tribe are the beneficial owners of lands held in trust by the United States pursuant to Section 5 of the Indian Reorganization Act. All *amici* are interested in future acquisitions of trust lands under that section, and some are now actively pursuing such acquisitions.

The Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota lost hundreds of thousands of acres of reservation lands as the result of allotment-era acts authorizing the Secretary to sell "surplus lands" in the Reservation to non-Indian homesteaders, and to allot lands within the Reservation to tribal members. *See New Town v. United States*, 454 F.2d 121, 127 (8th Cir. 1972); *Duncan Energy v. The Three Affiliated Tribes*, 27 F.3d 1294 at 1296-98 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 779 (1995). The Three Affiliated Tribes has a policy of reacquiring lands held in fee within the reservation boundaries and converting these lands to trust status. Thousands of acres of lands have been acquired in trust by the United States on behalf of the Tribe under Section 5 of the Indian Reorganization Act. In addition, *most* tribal members had their trust allotments taken from them as the result of construction of the Garrison Dam in the 1950s, thus necessitating the purchase of other trust lands for them elsewhere.

The Miccosukee Tribe of Indians of Florida has a reservation in the Florida Everglades. While this land is home to the Tribe and its members, it is of limited use for economic development due to strict land use restrictions in the Everglades. The United States has acquired various off-reservation parcels in trust for the Miccosukee Tribe of Indians of Florida for economic development, and the Tribe is currently actively pursuing having additional parcels acquired in trust by the United States.

The Menominee Tribe of Wisconsin has a reservation of over 200,000 acres which is largely forested and comprises the Tribe's valuable forest asset. Very little acreage is available for economic development or other use. The Tribe is considering a request that the Secretary acquire a number of parcels of land in trust for the Tribe under Section 5 of the Indian Reorganization Act.

The Seminole Tribe of Florida also has a land base in the Everglades. It has acquired thousands of acres of



land through the private purchase and subsequent transfer of that land to the United States to be held in trust for the Tribe pursuant to Section 5. The Tribe has pending a request that approximately sixty acres be placed in trust status for the benefit of the Tribe.

The Narragansett Indian Tribe's 1800-acre reservation in the State of Rhode Island is held in trust by the United States pursuant to Section 5 of the Indian Reorganization Act. The Tribe also has pending a request that additional land be acquired for it pursuant to Section 5. Denial of that request would jeopardize the planned construction of 50 low-income houses for tribal members, since the Department of Housing and Urban Development requires that the land on which the houses are to be built be transferred into trust for the Tribe pursuant to Section 5.

The St. Regis Mohawk Tribe has a small reservation in upstate New York which was reduced to its current size by action of the state of New York many years ago. The Tribe is currently pursuing having additional land acquired in trust by the United States for the benefit of the Tribe.

## SUMMARY OF ARGUMENT

*Amici* Indian tribes submit this brief in support of the Federal petitioners for a writ of certiorari. The Eighth Circuit has ruled that Section 5 of the Indian Reorganization Act of June 14, 1934, 25 U.S.C. § 465, which authorizes the United States Secretary of the Interior ("Secretary") to acquire lands to be held in trust for Indian tribes and individual Indians, is an unconstitutional delegation of legislative power to the Secretary. The Eighth Circuit erred in this ruling and did so by reaching the constitutional issue without first deciding the non-constitutional issue of whether the plaintiffs were entitled to the hearing they sought challenging the acquisition at issue here under the Administrative Procedures Act, 5 U.S.C. §§ 701-706. By declaring Section 465 unconstitutional, the Eighth Circuit has cast doubt upon the status of mil-

lions of acres of land acquired by the Secretary in trust on behalf of Indian Tribes over the last 60 years. Amici support the position of the federal petitioners that this Court must act either by vacating both the decision of the Eighth Circuit and the District Court and remanding the case to the Secretary for reconsideration and the entry of a new administrative decision or by granting review of the Eighth Circuit's erroneous ruling. Amici have requested the permission of the parties to file this brief and they have consented.

## ARGUMENT

### I. THE CONSTITUTIONALITY OF SECTION 5 OF THE INDIAN REORGANIZATION ACT AFFECTS THE STATUS OF ALL INDIAN LAND TAKEN INTO TRUST IN THE LAST 60 YEARS

The Eighth Circuit's decision holds unconstitutional a statute under which land has been acquired for the economic, political, and social development of Indian tribes and individual Indians for over 60 years. As stated by Judge Murphy in his dissent from the Eighth Circuit's decision:

> "The court invalidates today a congressional enactment designed to acquire land in trust for Indians that has been in place for over sixty years and, in the process, places in doubt the status of all Indian trust land." App. 15a[1] (Murphy, J., dissenting).

Because the parcel involved in this case had already been acquired in trust prior to the decision, *see* App. 3a, the decision calls into question the status of all lands acquired in trust under Section 5 in the past 60 years and thousands of acres of land that have been taken into trust for the six *amici* tribes.[2] The decision raises important

[1] References are to Appendix A filed by Petitioners.

[2] Section 5 of the Indian Reorganization Act applies on its face only to tribes who voted to organize under that act, but Section 203 of the Indian Land Consolidation Act, 25 U.S.C. § 2202, extended Section 5 to tribes not organized under the Indian Reorganization Act. Thus, all federally recognized tribes would be affected by the lower court's ruling.



and disturbing questions as to the status of those lands. If the Secretary had no power to acquire these lands, are the acquisitions void? If so, who owns the lands, the tribe or Indians for whom the lands were acquired in trust, or the transferor or his heirs?[3] If the lands taken into trust over the past sixty years remain in Indian hands, but lose their trust status, they may be subject to state property taxes which would place a severe economic burden on the tribes and Indians and could result in additional losses of tribal and Indian land. *See, County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992) (county could impose property taxes on land patented in fee, within the reservation, and owned by reservation Indians or the Yakima Nation).

The Eighth Circuit's decision thus raises the specter that tribes and Indians could lose the lands they have acquired under Section 5 of the Indian Reorganization Act. This would tragically undermine one of the principal goals of the Indian Reorganization Act, the acquisition of lands for the Indians to make up for the loss of 90 million acres of Indian lands (or about two-thirds of their lands) as a result of the allotment policy. *See County of Yakima v. Yakima Nation*, 502 U.S. at 276; App. 22a (Murphy, J., dissenting).

The Eighth Circuit's decision will also have a prohibitive effect on future acquisitions of lands for tribes and individual Indians, and thwart the development of reservation economies, and tribal self-determination. Should this decision stand, tribes will lose more than land base. The lower court's decision will adversely impact the future economic growth and development of the Indian tribes by placing tribal lands in the same precarious posi-

[3] In some acquisitions of trust property, the tribe first buys the property in fee and then transfers it to the United States to be held in trust. In others, the United States acquires the property from a third party for the tribe.

tion that they were in before the enactment of the Indian Reorganization Act.

Because of the potential disastrous effect the decision will have on literally millions of acres acquired pursuant to the Indian Reorganization Act and held in trust for Indians, this Court must take action as requested by the United States either by vacating and remanding to the Secretary for further consideration or by granting plenary review.

## II. THE LOWER COURT ERRED IN REACHING THE CONSTITUTIONAL ISSUE WITHOUT FIRST RESOLVING THE ADMINISTRATIVE PROCEDURES ACT ISSUE

As the dissenting opinion of Judge Murphy notes, it is a "fundamental rule of judicial restraint" that constitutional issues should not be reached unless necessary to a decision. App. 16a (Murphy, J., dissenting) (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157 (1984)). In this case, plaintiffs sought review under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA"), of the Secretary's decision to acquire the lands in trust. The district court dismissed the case, ruling that it had no jurisdiction to review plaintiffs' APA claims because the Quiet Title Act, 28 U.S.C. § 2409a, which permits the United States to be sued to resolve real property disputes, does not apply to trust lands. Although the "primary focus" of this appeal was the district court's dismissal of plaintiffs' APA claims, App. 15a (Murphy, J., dissenting), the lower court did not decide this nonconstitutional issue, but instead unnecessarily reached the constitutional issue in violation of the "fundamental rule of judicial restraint."

The lower court's failure to consider the availability of APA review of the Secretary's decision was particularly egregious here because "resolution of the APA inquiry could inform the analysis of the delegation issue since the availability of judicial review of an agency action is relevant in determining whether the authorizing statute is a lawful delegation." App. 17a (Murphy, J., dissenting) (citing *United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1944)). As Judge Murphy further stated:

> The availability of judicial review of the Secretary's actions may also serve to limit the delegation here. *See Garfinkel*, 29 F.3d at 459. Judicial review 'is a factor weighing in favor of upholding a statute against a non-delegation challenge.' *Id.* App. 229.

While the majority below recognized this principle, instead of deciding the issue, it relied on the Secretary's mere assertion that his decision is unreviewable. App. 6a. In so ruling, the lower court erred. Before reaching the question of whether Section 5 of the Indian Reorganization Act is constitutional, the Court must first decide whether the APA allows for review of a Secretarial decision to take land into trust pursuant to the Indian Reorganization Act.

There are three additional reasons why the Court should have first reached the issue of reviewability of the Secretary's decision under the APA. First, as noted above, a decision invalidating Section 5 of the Indian Reorganization Act would have a grave impact on the status of millions of acres of Indian trust lands and would prevent future acquisition of lands for the tribes. The Court should seek to avoid such an unnecessary impact.

Secondly, the decision invalidates the IRA under the nondelegation doctrine, a virtually defunct doctrine under which no federal legislation has been struck down for over sixty years. As Judge Murphy stated, "Only twice in its history, and not since 1935, has the Supreme Court invalidated a statute on the ground of excessive delegation of legislative authority." App. 18a (Murphy, J., dissenting). The Court should not strain to hold a statute un-

constitutional under a doctrine of questionable viability when a non-constitutional basis for a decision may exist.

Finally, and perhaps most importantly, the Secretary has now explicitly provided for judicial review of his decisions to take land into trust. Since the decision below was premised on the lack of judicial review, the decision's future application is limited. But this still leaves all trust acquisitions prior to the new Secretarial regulation in doubt. The best way to remedy this problem is to vacate both decisions below and remand the case to the Secretary for further consideration and decision.

## CONCLUSION

For the forgoing reasons, the Court should grant the petition for writ of certiorari or in the alternative, vacate the decisions below and remand the matter to the Secretary for further proceedings.

Respectfully submitted,

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